NO. 449

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

MOONEY AIRCRAFT, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mooney Aircraft, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 5, 1967 (Petition for Rehearing in the said cause having been denied on May 5, 1967).

REPORT OF THE OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, infra, pages 9-11 is reported in 337 F. 2d. 605.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 5, 1967. (Appendix A, infra, pages 9 - 11). The Supplemental Decree was entered on May 18, 1967. (Appendix B, infra, page 12). Rehearing was denied on May 5, 1967. (Appendix C, infra, page 13).

The jurisdiction of this Court is invoked under 28 USCA, Section 1254 (1).

III.

QUESTION PRESENTED

1. Whether the National Labor Relations Board and the United States Court of Appeals properly interpreted Section 10 (c) and (e) of the National Labor Relations Act and the Labor Agreement in connection with the reinstatement of George E. Mays.

IV.

STATUTORY PROVISION INVOLVED

The Statutory provisions involved in this case are Section 10 (c) and (e) of the National Labor Relations Act reading, in part, as follows:

Section 10 (c) "*** If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is

engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act ***."

Section 10 (e) "*** The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.***"

STATEMENT

Mays was terminated by Petitioner on August 9, 1962. At the time of termination he was classified as a Class A Mechanic in the Maintenance Department. He was reinstated to his former position on November 27, 1964 as a Class A Mechanic in the Maintenance Department under a Decree of the Fifth Circuit Court of Appeals, which enforced the Board's Decision and Order of June 5, 1963, which directed that Petitioner "*** offer to George E. Mays immediate and full reinstatement to his former or a substantially equivalent position *** and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him." (Italics ours). N.L.R.B. vs. Mooney Aircraft, Inc., (C.A.5), 328 F. 2d. 426.

The National Labor Relations Board offered no evidence whatsoever to show that Mays, in the absence of his discharge, should have been promoted to Leadman and, therefore, that his back pay

on reinstatement should have been calculated on the basis of Leadman's wages instead of Class A Mechanic's wages .

Petitioner, on the other hand, introduced portions of its Labor Agreement dated February 15, 1964 which reads, in part, as follows:

Article II. Seniority, *** Par. D " In cases of transfer, lay off, promotion, shift assignment or recalling employees temporarily laid off, greater length of service governs if ability and efficiency are equal." (R. 74, 323-325). Petitioner also introduced evidence to show that C. C. Fritz and C. M. Stephens, the two leadmen in the Maintenance Department, were promoted to Leadmen during Mays' discharge. (R.102,103).

The Labor Agreement provides that seniority comes into play, insofar as promotions are concerned, only when ability and efficiency are equal. Petitioner introduced evidence to show that although Mays had seniority over Fritz and Stephens (R.366), Mays had only approximately six months experience (in three different jobs) prior to coming to work for Petitioner. Fritz and Stephens each had approximately twelve years experience prior to coming to work for Petitioner. (R.322,323).

Petitioner introduced a document titled "Leadman Qualifications". Said document listed the following requirements:

"1. Job knowledge, leadership, ability and initiative.

2. Ability to receive instructions and pass them on to other employees in a constructive manner.

3. Ability to read and understand engineering drawings (necessary in his area).

4. Proper attitude toward company objectives, and other employees and ability to get along with fellow employees.

5. Aggressive, productive and have the ability to impart this to other employees.

6. Good attendance record.

7. Working knowledge of necessary records and other paper work in his area.

8. Be able to plan their work to best advantage of expediency.

9. Ability to train new employees.

10. Must have, in the opinion of management, capability of future development as Senior Leadman and possibly Foreman or management material.

11. All requests for promotion for leadman must be approved by the Vice President of Manufacturing."

(R. Respondent's Exhibit No. 3, R. 264, 265, 378). Petitioner introduced evidence that these Leadan Qualifications had been in full force and effect since December 17, 1963. (R.378).

Petitioner introduced evidence that Fritz and Stephens had more efficiency and ability than Mays. (R. 267). Mays did not possess the initiative and leadership that were required for Leadman in the Maintenance Department. (R.266). There were complaints from his (Mays') fellow workers that they did not care to work with him. (R.311). Mays' attitude was of a belligerent nature. (R.322).

Mays testified that during the time he was employed by Loadcraft (between December of 1962 and November of 1964) he was absent only 3-1/2 days. (R.79,80). However, when later testifying under oath and after being presented with a sheet titled "Employee's Absentee Record", prepared by Loadcraft for the year 1963 only, which showed that Mays was absent a total of 21-1/2 days and tardy twice, Mays admitted that the list was correct. (Respondent's Exhibit No. 2; R.144-149, 317-320).

Prior to Mays' termination, during the period of time from January 1, 1962 through August 9, 1962, Mays was unreported absent forty hours, plus reported absent 24 hours plus a leave of absence of 56 hours. During this same period of time, Stephens was reported absent 13 hours plus an 8-hour leave of absence and Fritz was not absent at all. (R. 320,321).

Petitioner introduced evidence to show that Mays did not have the ability to train new employees. (R.385-389). By Mays' own admission he is not qualified to do the work that Fritz does. (R.103,104).

Although much emphasis was placed by the National Labor Relations Board on the fact that Mays was a Leadman on a sub-assembly project at Loadcraft during the period of his discharge, Petitioner introduced evidence to show that after having worked there approximately one year, and over a five-month period of time, Mays was:

1. First an acting Leadman.
2. 30 days later, went on probation as Leadman.
3. 30 days later, he made Leadman.

After about five months, Mays then regressed back to working "on a contract where the certified welders worked", and subsequently was pulled off the contract where the certified welders worked and was classified as a welder when he left the company. (R. 66-71, 161, 403, 404).

The determining factor is not whether Mays had the ability and efficiency -- it is whether Mays' efficiency and ability are equal to that of Frits and Stephens.

Since all of the evidence clearly shows that Mays' ability and efficiency are far below that of Fritz and Stephens, seniority would not be the governing factor in this promotion. Fritz and Stephens meet all of the requirements of Leadman in Respondent's Maintenance Department; Mays does not. (R.74, 220-222, 229-246, 251-261, 264-267, 323-325, 375-398, 378-391).

Mays was not at the time of his discharge and never had been a Leadman while in the employ of Petitioner. (R. 44-52).

REASON FOR GRANTING THE WRIT

1. This case presents an important question of first impression. The decision of the Court of Appeals is not in accord with the National Labor Relations Act and the evidence in this case.

This is not an unfair labor practice case. The issue is the correct formula for the determination of back pay under the National Labor Relations Act.

The National Labor Relations Board, who has the burden of proving the gross back pay due under the back pay period (N.L.R.B. vs. Mastro Plastics Corp., 1962, 50 LRRM 1006), offered no evidence whatsoever to show that Mays should have been promoted to Leadman had he not been discharged. The Labor Agreement, dated February 15, 1964, which was in full force and effect during all the time in question, provides that "In cases of ***promotion*** greater length of service governs if ability and efficiency are equal." (Italics ours). (R. 74, 323-325).

Petitioner, while it did not have the burden of proving,

must not be the governing factor in this promotion. Fritz and Stephens meet all of the requirements of Leadman in Respondent's Maintenance Department; Mays does not. (R.74, 220-222, 229-246, 251-261, 264-267, 323-325, 375-398, 378-391).

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Petitioner, while it did not have the burden of proving, or the burden of going forward, introduced evidence to show "Leadman Qualifications" and introduced evidence to show

that both C. C. Fritz and C. M. Stephens, the only two who were promoted to Leadmen in the Maintenance Department during Mays' period of discharge, (R.102,103), were more able and efficient than Mays. These facts having been established by the evidence, seniority was not to be considered under the provisions of the Labor Agreement.

The National Labor Relations Board and the Fifth Circuit Court disregarded the provisions of the National Labor Relations Act, disregarded the provisions of the Labor Agreement and disregarded the evidence adduced at the trial.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Hal Rachal

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Kerrville, Texas

Attorney of Record
for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21119

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

MOONEY AIRCRAFT, INC.,
Respondent.

Supplemental Petition for Enforcement of an Order of the National Labor Relations Board. (Texas Case).

(April 5, 1967.)

Before RIVES and BROWN, Circuit Judges, and GARZA, District Judge.

PER CURIAM: Based on the Board's determination that George E. Mays had been discriminatorily discharged in August 1962 by *Mooney Aircraft, Inc.*, 142 NLRB 942, this Court earlier entered judgment enforcing the Board's order for reinstatement with backpay. *NLRB v. Mooney Aircraft, Inc.*, 5 Cir., 1964,

337 F.2d 605.[1] Following an extensive supplemental evidentiary hearing before a trial examiner whose decision was upheld by the Board, this cause is once again before the Court. The Board seeks a supplemental decree enforcing its backpay award of $2,952.30. This included, with appropriate computation,[2] a finding that Mays, had he not been discriminatorily discharged, would have been promoted from mechanic A to leadman on August 4, 1964.

Considering the public interest objective in backpay orders and the narrow issue involved, arising as it does out of a detailed factual hearing, the Court is of the view that this 1962 unfair labor practice should now be vindicated without further delay.

There is substantial evidence in the record from which the Board could conclude that Mays, by virtue of his seniority, in all probability would under the terms of the collective bargaining agreement[3] have been promoted to leadman on August 4, 1964. There is no merit to the contention that this exceeds the

[1] Mooney Aircraft is no stranger to such litigation. See Mooney Aircraft, Inc., 138 NLRB 1331, enforced, NLRB v. Mooney Aircraft, Inc., 5 Cir., 1964, 328 F. 2d 426; Mooney Aircraft, Inc., 132 NLRB 1194, enforced, NLRB v. Mooney Aircraft, Inc., 5 Cir., 1962, 310 F.2d 565.

[2] Backpay was computed on the basis of mechanic A wages through the period of reinstatement on November 27, 1964. From and after August 4, 1964, down through March 31, 1965, the last quarter prior to the hearing, there was added to the award an amount equal to the differential between the wages of a Mechanic A and those of a leadman.

[3] "In cases of transfer, lay off, promotion, shift assignment or recalling employees temporarily laid off, greater length of service governs if ability and efficiency are equal."

Testimony of the Employer's witnesses disparaging Mays' ability and efficiency were discredited by the trial examiner and Board.

scope of the Board's remedial powers under its order which provided, inter alia, that Mays be reinstated "without prejudice to his seniority or other rights and privileges." These included Mays' prospect of, and right to, promotions.

This determination likewise forecloses the Employer's assertion that the Board erred in awarding wages for the period subsequent to the date of reinstatement. Failure to promote to leadman was, the Board found, itself discriminatory. The relief granted[4] was therefore necessary to extinguish the effects of the discrimination.

The Employer's final assertion, that the Board's allowance for Mays' absence record was insufficient, is groundless.

ORDER ENFORCED.

[4] This portion of the award related solely to the wage differential between the wages of a mechanic A and leadman, an award which Mays was, and will be, entitled to until the Company offers the promotion.

Adm. Office. U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 21,119
MOONEY AIRCRAFT, INC., Respondent.	)	

SUPPLEMENTAL DECREE

Before: RIVES and BROWN, Circuit Judges and GARZA, District Judge.

BY THE COURT: This Court, having on November 19, 1964, entered its decree enforcing the Board's order aginst Respondent, Mooney Aircraft, Inc., its officers, agents, successors, and assigns, and the Board, having petitioned this Court for the entry of a supplemental Decree specifying the amounts of backpay due; upon consideration of said petition.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, Mooney Aircraft, Inc., its officers, agents, successors, and assigns, shall:

Make whole George E. Mays for any loss of pay suffered (through March 31, 1965), by payment to him of the amount of $8,988.30, with interest and minus the tax withholding required by Federal and State laws.

ENTERED: MAY 18 1967

A true copy.
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By Gilbert Ramirez
Deputy
New Orleans, Louisiana MAY 18 1967

(Original Filed - May 18, 1967)

[53-1964 - Brown]

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 5, 1967
EDWARD W. WADSWORTH
CLERK

NO. 21119

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

MOONEY AIRCRAFT, INC.,
Respondent.

Supplemental Petition for Enforcement of an Order of the National Labor Relations Board.

(May 5 , 1967)

On Petition for Rehearing

Before RIVES and BROWN, Circuit Judges, and GARZA, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 449

MOONEY AIRCRAFT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-11) is reported at 366 F. 2d 809. The supplemental decision and order of the National Labor Relations Board issued following a backpay proceeding are reported at 156 NLRB 326 (R. 51).[1]

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[1] "R." refers to Volumes I and III, Transcripts of Record filed with the Court; "Tr." refers to Volume II, the stenographic transcript of the hearings.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1967. The petition for a writ of certiorari was filed on August 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that an employee would have been promoted to a higher paying job had he not been discriminatorily discharged, and thus that his backpay award should take into account the higher rate for the period following the date of such probable promotion.

STATUTE INVOLVED

Section 10(c), the relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is as follows:

> Sec. 10 * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *.

STATEMENT

A. The Board's Findings and Conclusions

In *Mooney Aircraft, Inc.*, 142 NLRB 942, the Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging George E. Mays on August 10, 1962, because of his union activities. The Board's order required petitioner to "offer to George E. Mays immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges" and to "make George E. Mays whole for any loss of earnings he may have suffered because of the discrimination against him * * *." On October 21, 1964, the Court of Appeals for the Fifth Circuit enforced the Board's order. *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 337 F. 2d 605.

On November 27, 1964, shortly after the entry of the court's decree, petitioner reemployed Mays as a "Mechanic A" (R. 34; Tr. 80). Prior to the discriminatory discharge, Mays had worked as one of eight or nine Mechanics A in petitioner's Maintenance Department (Tr. 45). On August 3, 1964, approximately three and a half months prior to Mays' reinstatement, petitioner promoted two Mechanics A, Fritz and Stephens, to the two leadman positions in the department (R. 34; Tr. 390). The collective bargaining agreement in effect at the time of the promotions provided that: "In case of transfer, layoff, promotion, shift assignment or recalling employees temporarily laid off, greater length of service governs if ability and efficiency are equal" (R. 34; Tr. 325).

Mays not only had greater seniority than either Fritz or Stephens, but he had greater seniority than any other Mechanic A (R. 34; Tr. 366).

The Board instituted the instant proceeding pursuant to Section 102.52, *et seq.* of its Rules and Regulations (29 C.F.R. § 102.52), to determine the amount of back pay due Mays. The Board adopted the findings, conclusions, and recommendations of the Trial Examiner who heard the case, and found that Mays, on the basis of his seniority under the terms of the applicable collective bargaining contract, would have been entitled to promotion to leadman on August 4, 1964, but for the unlawful discharge. The Board also found that petitioner had discriminatorily failed to reinstate Mays as a leadman and that his back pay award should reflect the higher pay he would have received as a leadman (R. 51, 34, 36, 38). The relevant testimony credited by the Board as the basis of its findings may be summarized as follows:

Mays had the greatest seniority of any Mechanic A in petitioner's maintenance department, and petitioner did not dispute this factor. Mays, together with Foreman Cox, had taught employees how to weld (R. 34; Tr. 48, 314), and Mays had completed a blueprint-reading course and passed welding tests (R. 34-35; Tr. 72, 161-163, G.C. Ex. 3). Prior to his discharge Mays had done about half of the welding in the Department (R. 36; Tr. 48, 236-238). There was no evidence or suggestion by any supervisory personnel that Mays lacked technical ability (R. 34).

Petitioner's vice-president of engineering and manufacturing, Ralph Harmon, testified that Mays lacked

the necessary "initiative and leadership" for promotion to leadman and that Mays had limited ability because he had never trained anyone "completely" (R. 34; Tr. 264, 266, 386-388). However, Harmon repeatedly conceded that he seldom observed Mays closely (R. 34; Tr. 266, 382, 385, 402-403), and disclaimed personal knowledge of Mays' specific qualification for the leadman job (R. 34; Tr. 403). Petitioner pointed to no evidence that anyone in its employ, including Fritz and Stephens who were promoted to leadmen, ever completely trained any new employees, and no such evidence was offered. Although petitioner did stress the experience Fritz and Stephens had gained prior to their employment by petitioner, it is uncontradicted that Mays had actually been a leadman at a previous job (R. 35; G.C. Ex. 5).

Foreman Cox testified that Mays sometimes needed supervision and that he did not get along well with people (R. 35; Tr. 240-241; 245-246), while Production Superintendent Tonnessen testified, generally, that Mays was not as qualified as Fritz and Stephens for the leadman position (Tr. 225-227). However, Cox had commended Mays for doing a good job by himself when he was assigned to painting (R. 35; Tr. 246). Neither Cox nor Tonnessen testified "to any observed failure by Mays to measure up" (R. 35). And, as the court below observed (Pet. App. A, n, 3), their generalized disparagement of Mays' ability was discredited by both the examiner and the Board.

On the basis of the foregoing testimony the Board found that, had he not been discriminatorily dis-

charged, Mays would have been promoted to leadman on the basis of his seniority on August 4, 1964; the Board discounted as unpersuasive petitioner's efforts to show that Mays was not qualified for promotion or that he was less able or efficient than Fritz or Stephens (R. 34, 35).[2] As a result, the Board computed Mays' back pay up to that date at the rate of a Mechanic A and from then on at the rate he would have earned as a leadman (R. 36-37). On the basis of its findings that Mays would have been promoted to leadman and that the failure to reinstate him as a leadman would in itself be discriminatory, the Board also directed petitioner to effect the promotion (R. 38).

In calculating the amount of back pay due Mays, the Board, according to established procedure, deducted from Mays' gross back pay his interim earnings and made a further adjustment to reflect the number of days Mays would have been absent from work.[3] Applying such a formula, the Board concluded that Mays was entitled to net back pay totaling

---

[2] Contrary to petitioner's assertion (Pet. 6), Mays did not admit that he was not qualified to do the work that Fritz does. Mays testified that, although he considered himself as qualified as Fritz and Stephens, he and Stephens were "not well up" on the more advanced electrical phase of maintenance (Tr. 104).

[3] Although the record discloses facts concerning Mays' absences during certain years, this evidence, as the Board noted, was introduced in connection with the issue of absenteeism as it affected back pay and not to show that Mays' absences from work were a reason for not promoting him (R. 35; Tr. 320-323).

$2,952.30, with interest and minus tax withholdings required by federal and State laws, and directed petitioner to reimburse Mays in that amount (R. 51, 38).

B. The Decision of the Court of Appeals

The court of appeals found there was "substantial evidence in the record from which the Board could conclude that Mays, by virtue of his seniority, in all probability would under the terms of the collective bargaining agreement have been promoted to leadman on August 4, 1964," and accordingly enforced the Board's order (Pet. App. A, 10-11).

ARGUMENT

Petitioner does not challenge the power of the Board in an appropriate case to order an employee reinstated with the benefit of a promotion to which he would have been entitled, under a collective bargaining agreement, if he had not been discriminatorily discharged. The sole question presented by the petition is whether the court of appeals properly held that substantial evidence supported the Board's finding that Mays was at least equally qualified for promotion to leadman and was entitled to the promotion on the basis of his greater seniority, in the absence of a showing that he would have been disqualified for some other reason. This factual question does not warrant further review (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503), and in any event, the record as summarized, *supra*, adequately supports the Board's finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
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National Labor Relations Board.

AUGUST 1967.

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